United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7161

To be argued by
ALFRED S. JULIEN

In The

United States Court of Appeals

For The Second Circuit

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Southern District of New York (C.D. 73 Civ. 713 (T.P.G.))

BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT AS APPELLEE

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BRIEF FOR PLAINTIFF-APPELLEE-CROSS APPELLANT AS APPELLEE

Preliminary Statement

The plaintiff-appellee-cross-appellant, FLM Collision Parts, Inc. ("FLM") is submitting this brief in response to the issues raised by the defendants-appellants-cross-appellees, Ford Motor Company and Ford Marketing Corporation ("Ford"), on Ford's appeal with respect to the district court's findings that Ford had violated Section 2(a) of the Robinson-Patman Act, awarding FLM $874,506 in treble damages, $135,000 in attorneys' fees and issuing an injunction enjoining Ford from discriminating against FLM in the sale of crash parts.

The issues regarding the district court's finding that Ford had not violated Sections 1 and 2 of the Sherman Act were considered in a previous brief submitted by FLM on its cross-appeal.

Questions Presented

1. Is Ford permitted to discriminate in price between different purchasers of crash parts of like grade and quality which discrimination is not cost justified, but based soley upon who its purchasers resell those crash parts to?

2. Is Ford permitted through a discriminatory pricing scheme to compel its franchised dealers to sell crash parts directly to body shops and not through independent wholesalers such as FLM and to prevent such independent wholesalers from competing in the sale of crash parts?

3. Do the antitrust laws require that FLM which is clearly and directly being injured by Ford's discriminatory pricing scheme be a direct purchaser from Ford in order to have standing to sue, particularly when Ford's discriminatory pricing scheme is aimed at FLM with the intended purpose of preventing FLM from competing as an independent wholesaler of crash parts?

4. Where Ford's discriminatory pricing scheme has prevented FLM from receiving th wholesale incentive allowance which it had previously received on its purchases of crash parts during the period complained of, is the proper measure of damages the amount of that wholesale incentive allowance which FLM would have received and Ford would have paid, but for the discriminatory pricing scheme then in effect?

5. When Ford has been found to have violated the antitrust laws and prevented FLM from competing in the sale of crash parts, should it be permitted to avoid paying damages for that portion of FLM's claim with respect to lost sales and lost profits by claiming that FLM must show the amount of lost sales and lost profits with precision or should FLM be permitted to recover for its lost sales and lost profits if those damages are calculated upon a reasonable estimate based upon sufficient relevant data?

Statement of Facts

A complete statement of facts giving the background of this case is found in the brief previously submitted by FLM on its cross-appeal and need not be repeated here. Following is a brief recitation of the basic facts.

The plaintiff, FLM, is a New York corporation founded in 1965 with its principal place of business in Yonkers, New York (24).* Since the date of its incorporation, FLM's business has been the purchase of Ford crash parts from franchised Ford dealers and reselling those parts to independent garages, service stations and repair shops (24).

Crash parts for Ford automobiles are sold by Ford only to franchised Ford dealers that use crash parts for their own

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*All page references are to the joint appendix unless otherwise indicated.

repair operations and, at the same time, act as wholesalers of crash parts to independent repair shops (26). These independent repair shops compete with Ford dealers for the consumers' repair business.

Some time prior to November 1, 1968, the Federal Trade Commission advised Ford that its method of distributing crash parts was an unfair method of competition since independent repair shops were paying more for crash parts than the Ford dealer that purchased the parts directly from Ford since the Ford dealer which was the only source of crash parts was competing with the repair shops for the consumers' business (27, 2e**).

The Commission recommended that Ford sell crash parts directly to independent wholesalers and body shops (2e-3e). Ford, in order to avoid having to sell crash parts to independent wholesalers and body shops and to avoid having the Commission initiate a proceeding against it, instituted a policy of permitting a wholesale incentive allowance for crash parts.

This wholesale incentive allowance granted Ford dealers an additional discount on crash parts which the dealer did not use in its own repair operation, but acted as a wholesaler by reselling those parts. The allowance was generally 25 percent of the cost of the crash parts (333).

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*Page references ending in "e" refer to the exhibit volumes of the Joint Appendix.

After trial, the district court made a finding of fact that Ford, having FLM specifically in mind as the type of successful independent wholesaler it was attempting to discourage, effective July 1, 1971, changed its wholesale incentive policy so that Ford dealers would no longer receive a 25 percent discount, i.e., the wholesale incentive allowance, on crash parts resold to FLM (1603, 1598).* The allowance would only be received on sales made by Ford dealers directly to independent service stations and repair shops (28).

FLM's arrangement with the franchised Ford dealers from which it purchased crash parts was that it would pay franchised Ford dealers a small percentage over their cost and receive the benefit of all discounts and allowances, including the wholesale incentive allowance, Ford granted to its franchised dealers and which the franchised dealers would pass on to FLM (415).

After Ford's policy change, franchised Ford dealers no longer received the wholesale incentive allowance on sales to FLM and the allowance, therefore, could not be passed on to FLM (29). This, naturally, put FLM in a poor competitive position which Ford was fully aware of (973). FLM was now compelled to pay 25 percent more for crash parts than franchised Ford dealers with which it was competing in the sale of those crash parts to repair shops.

*The district court's opinion is officially reported at 406 F.Supp. 224 (S.D.N.Y. 1975).

After a seven-day trial without a jury, the Honorable Thomas P. Griesa found that Ford had violated Section 2(a) of the Robinson-Patman Act by charging different prices to different purchasers for the very same crash parts,depending solely upon who those parts were resold to (1604-1605).

Judge Griesa also found that FLM was the intended target of Ford's discriminatory pricing scheme and FLM was the only party being injured by Ford's discriminatory pricing scheme since the franchised dealers had passed along the entire incentive allowance to FLM and when it was withdrawn continued to sell to FLM at the same markup previously charged but simply no longer passed along the wholesale incentive allowance. FLM was thus "within the target area", in fact the target (1603, 1598), of Ford's discriminatory pricing scheme and, accordingly, had standing to sue for the injury which it had suffered by reason of Ford's violations of the antitrust laws.

Ford has appealed the district court's decision and has raised three issues for the Court's review:

1. Ford claims that since it charges each of its franchised dealers the same amount for crash parts depending upon whether those crash parts are sold to independent repair shops or sold to FLM, there is no discrimination between Ford dealers (p. 16, et seq., Ford's brief).

2. Ford contends that FLM does not have standing to sue since it has never purchased crash parts directly from Ford (p. 35, et seq., Ford brief).

3. Ford claims that even if it has discriminated in price and FLM does having standing to sue, the district Court erred in awarding FLM as its measure of damages the amount of the wholesale incentive allowance which it would have received but for Ford's discriminatory pricing scheme. (p. 39, et seq., Ford brief).

As will be shown, Ford's charging of different prices for the same crash parts to different Ford dealers depending upon whom these parts are resold to is a clear violation of Section 2(a) of the Robinson-Patman Act. FLM, as the clear target of Ford's discriminatory pricing scheme and the only party being injured by Ford's violation of the antitrust laws. has standing to sue for the injuries it has suffered. The district court's award of damages to FLM by calculating the amount of the wholesale incentive allowance withheld from FLM was proper and pursuant to a stipulation by trial counsel for Ford (1545). Ford's present appellate counsel cannot avoid that stipulation at this late hour.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY FOUND THAT FORD, BY CHARGING DIFFERENT PRICES TO FORD DEALERS FOR THE SAME CRASH PARTS DEPENDING UPON WHOM THEY RESOLD THOSE PARTS TO, WAS DISCRIMINATING IN PRICE BETWEEN PURCHASERS OF THE SAME PRODUCT IN VIOLATION OF SECTION 2(a) OF THE ROBINSON-PATMAN ACT.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a) provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . " (emphasis added)

The district court properly found, and Ford has stipulated (29), that since November 1972 Ford has charged Ford dealers who sell crash parts to FLM a higher price (25 percent more) for the very same crash parts than Ford charges a Ford dealer when it sells those crash parts directly to an independent repair shop.

The district court then went on to find that:

> " . . . the basic elements of a Section 2(a) violation are made out. Ford charges different prices to different purchasers -- Ford dealers -- for the same crash parts." (1604-1605).

Ford in its appeal to this Court has raised as its primary point the allegation that Judge Griesa erred when he found that Ford had discriminated in price between Ford dealers with respect to crash parts. Ford claims that there was no price discrimination between Ford dealers and that every Ford dealer was treated similarly. Each dealer was required to pay one price for crash parts when it resold those crash parts to an independent repair shop and every dealer was required to pay the same higher price of an additional 25 percent when it resold the same crash parts to FLM (p. 17, et seq., Ford's brief).

The basic fallacy and flaw in Ford's position which goes to the heart of its argument is in Ford's misconstruing what the Robinson-Patman Act means when it states that there shall be no price discrimination between different purchasers of the same commodity. Section 2(a) of the Act makes it clear that all purchasers of commodities of like grade and quality must be charged the same price for that commodity unless the difference in price is cost justified. A supplier may not charge different prices to purchasers of the same commodity which prices are not cost justified and are simply based upon

an arbitrary distinction created by a supplier with respect to its customers. See Mueller Co. v. F.T.C., 323 F.2d 44, 45 (7th Cir. 1963), cert. den., 377 U.S. 923 (1964).

Ford's construction of the Robinson-Patman Act would permit a manufacturer to charge different prices for the same goods to different purchasers depending solely upon whom that purchaser resold the goods to after it had acquired title to them from Ford. Aside from this being a clear violation of Section 1 of the Sherman Act pursuant to the doctrine set out in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856 (1967), as discussed in FLM's prior brief submitted on its cross-appeal, this construction would also require the Robinson-Patman Act to be construed in a manner directly "counter to the broad goals which Congress intended it to effectuate." F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 88 S.Ct. 904, 908 (1968).

The purpose behind the Robinson-Patman Act was to prevent the chain stores which were expanding greatly during the 1920's and 1930's from driving the small merchant out of business. The chains, due to their great purchasing power, were able to demand price concessions from suppliers and were able to resell at prices against which small merchants could not compete. See, generally, Rowe: Price Discrimination Under the Robinson-Patman Act, Chapter 1 (1962); and Rowe, "The Evolution of the Robinson-Patman Act: A Twenty Year Prospective", 57 Col. L. Rev. 1059, 1062 (1957).

The purpose of the Robinson-Patman Act was "for preservation of equal opportunity to all" (S. Rep. No. 1502, 74 Cong. Second Sess. 3 (1936)), and to make certain that all purchasers received the same price from suppliers, except to the extent that the price difference between various purchasers was 'cost justified', i.e., the extent to which a supplier saved shipping, packing or similar expenses by selling larger quantities to one purchaser than to another.

Congressman Utterback in reporting to the House of Representatives on the Robinson-Patman bill stated what the Act intended when it spoke of the cost justification of price differentials:

> "But the bill does not permit price differentials merely because the quantities purchased are different, or merely because the methods of selling or delivery are different, or merely because the seasons of the year in which they enable production are different. There must be a difference in cost shown as between the customers involved in the discrimination, and that difference must be one 'resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.' A customer granted the benefit of a discrimination may receive it only on the basis of the difference between his methods or quantities of purchase an delivery and those of other customers not receiving the differential.
>
> The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken." 80 Cong. Rec. 9417 (1936) (emphasis added).

If Ford's argument is accepted -- that there is no price discrimination between franchised Ford dealers that are charged different prices depending upon whom they resell to -- the Robinson-Patman Act would become a nullity. A supplier that wishes to give a chain store or other favored customer a lower price than that charged to other purchasers and which price was not cost justified, would merely have to act through a wholesaler, rather than sell directly to the chain store. By doing so, it would completely insulate itself from any liability arising from a violation of the Act. It could simply charge its dealers a greatly varied price, not cost justified, depending upon whom they resold to, e.g., charging a wholesaler fifty cents for an item if the wholesaler resold that item to a chain store and one dollar for the very same item if it were resold to anyone else.

According to Ford, a supplier would not be violating the Robinson-Patman Act so long as it was charging all wholesalers the same price depending upon whom they resold to. To read the Act this way is to make it a nullity and "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." Perkins v. Standard Oil Company of California, 395 U.S. 642, 647 (1969).*

*The author of a note in the New York Law Forum in 1966 before Perkins had been decided -- 12 N.Y.L.F. 91 (1966) -- takes the same position that the Court later adopted in Perkins and points out that if a supplier could insulate himself from liability simply by adding an additional link in the distributive chain, it would make a mockery of the Robinson-Patman Act. at 99, see, especially, n. 42.

It is one thing for a supplier to sell to all purchasers at the same price without regard as to whether they are retailers or wholesalers. This is permitted under the Act. See Bird & Son, Inc., 25 F.T.C. 548 (1937); Klein v. Lionel Corp. 237 F.2d 13 (3d. Cir. 1956). In that situation, there is no price difference and no price discrimination. "[A] price discrimination . . . is merely a price difference." F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). It is quite another thing for a supplier to charge different prices so that there is a price difference to purchasers of the same item, when those prices are not cost justified, with the different prices based solely upon a supplier's arbitrary determination that its customers should be charged less if they resell to favored persons and more if they resell to others. Arbitrary classifications of purchasers by a supplier do not permit it to charge different prices to customers for goods of the same grade and quality. Mueller Co. v. F.T.C., supra.

Similarly, Ford's argument that all Ford dealers are treated equally because "no dealer electing to do business with FLM was disadvantaged in his competition for that business with any other dealer. Every dealer reselling to FLM paid the same price; . . . " (p. 18, Ford's brief) likewise consists of a narrow and improper construction of the Robinson-Patman Act and the antitrust laws in general. This argument again starts from the false premise that the Robinson-Patman Act permits a

supplier to arbitrarily discriminate in price between various customers and so long as tnis discrimination is applied on some uniform basis, although not justified by the Robinson-Patman Act, it is permitted. The cases, however, see, e.g., Mueller Co. v. F.T.C., supra, have made it clear that Ford's position is an erroneous one and if accepted would completely subvert the purpose and intent of the Robinson-Patman Act.

Ford's attempt in its brief to compare its egregiously discriminatory pricing policy intended to prevent independent persons from wholesaling Ford crash parts to such common business practices as cash discounts for prompt payment (p. 19, Ford's brief) is absurd.

Similarly, without merit was Ford's attempt to characterize its policy effective July 1, 1971 which withheld the wholesale incentive allowance from Ford dealers on sales to FLM as a "clarification" of the wholesale incentive policy (p. 8, Ford's brief). The district court had specifically found that Ford's personnel responsible for this change in policy withholding the wholesale incentive allowance from dealers on sales to FLM had FLM specifically in mind as the type of successful independent wholesaler of crash parts it was attempting to eliminate (1603).

The district court also found that Ford had created this "clarification" of its wholesale incentive policy for "the specific purpose of inhibiting sales to middlemen such as FLM and for the purpose of discouraging such middlemen from competing in the distribution of crash parts" (1629). Ford's euphemistic reference to its predatory, discriminatory pricing policy which was intended to drive FLM out of business cannot be explained away through the euphemism of refering to that predatory policy as a "clarification".

Ford in its brief likewise attempts to create the impression that the wholesale incentive policy prior to its amendment which permitted Ford dealers to obtain the wholesale incentive allowance on sales to FLM was permitting dealers to abuse the wholesale incentive policy. A careful reading of Ford's brief clearly shows that the only abuses which even Ford is able to make reference to involved spark plugs and other similar products, not crash parts. Spark plugs and other such products were distributed by Ford through different distribution systems including independent wholesalers and as the district court properly pointed out in its decision had nothing at all to do with crash parts (1633).

Ford has continually attempted to convince the Court that the reason for the change in the wholesale incentive allowance so as to deprive and no longer make it available to Ford dealers on sales to FLM was to prevent Ford dealers from

using an independent wholesaler such as FLM as a conduit in order to sell parts to each other and thus obtain the wholesale incentive allowance on crash parts which were used by Ford dealers in their own repair business. The district court made a specific finding of fact that FLM had never acted as a conduit between Ford dealers and had not provided the slightest basis for any concern that it would do so in the future (1632-1633).

If Ford was really concerned about dealers defrauding Ford by using a third-party as a conduit so as to receive the wholesale incentive allowance on parts used in the dealer's own repair operation, then the revision in the wholesale incentive policy which prevents dealers from obtaining the wholesale incentive policy on sales to FLM does nothing towards solving Ford's problem. If a Ford dealer is intent on defrauding Ford, it can just as readily do so by using several repair shops to whom it sells crash parts as a conduit by selling crash parts to a repair shop receiving the wholesale incentive allowance and then repurchasing those crash parts from the repair shop for use in the dealer's own repair operation.

Ford's claim that the reason for the withholding of the wholesale incentive allowance on sales by Ford dealers to FLM was to prevent FLM's acting as a conduit has no merit to it, is unsupported by the record and is an obvious attempt at justifying a predatory pricing policy designed to prevent independent wholesalers from dealing in crash parts.

Ford in its brief attempts to ridicule the district courts carefully reasoned opinion by diagraming hypothetical situations where an independent repair shop would actually be paying less than a Ford dealer for the same crash part (p. 28, Ford's brief). Although any decision, no matter how well-reasoned, can be made to seem absurd if carried to an extreme, the hypothetical situation outlined by Ford is one that can arise only because Ford has insisted on maintaining control over the distribution of crash parts and refused to permit independent wholesalers to engage in their distribution.

Ford has its dealers serve a dual function as both the wholesaler and retailer of crash parts at the same time. If Ford is thus caught in a position where its distribution policies necessarily violate the Robinson-Patman Act, it is not the fault of the district court in finding that Ford's policy has violated the Robinson-Patman Act with respect to FLM, but rather the fault lies with Ford in attempting to exercise complete control over the distribution of crash parts even after it has parted with title to those crash parts.

Ford in its brief consistently makes references to the fact that the wholesale incentive allowance was initiated at the behest of the F.T.C. (7, 9, 29) in an apparent attempt to convey the impression that the F.T.C. has somehow approved Ford's policy with respect to the wholesale incentive allowance. In fact, the F.T.C. had requested Ford to make crash parts

available through independent wholesalers or directly to retailers. It was Ford's reluctance to do so which led to the compromise of the wholesale incentive policy (1e-3e). It should be made clear that the F.T.C. at no time approved Ford's distribution plan which discriminates in price and which makes the wholesale incentive allowance dependent upon whom its franchised dealer resells crash parts to.

The F.T.C. upon being asked to render an advisory opinion concerning a manufacturers dealings with its wholesalers stated in no uncertain terms:

> "The Commission will not approve any standards whereby a wholesaler's eligibility for added discount- is contingent upon the imposition of specified restrictions upon his customers by him." 16 CFR 1[illegible].333.

Ford discriminated in price between franchised Ford dealers for the very same crash parts depending solely upon whom the dealer resold those crash parts to. The price discrimination was not cost justified and as the district court found had no valid purpose behind it except to prevent independent wholesalers from dealing in crash parts (1633). All of Ford's defenses and justifications for this discriminatory pricing scheme do not and cannot change the basic facts pointed out by the district court that Ford charges different prices to different purchasers for the same crash parts depending solely upon whom those parts are resold to (1604-1605) and that this is a clear and direct violation of Section 2(a) of the Robinson-Patman Act.

POINT II

THE DISTRICT COURT PROPERLY FOUND THAT SINCE FORD'S DISCRIMINATORY PRICING POLICY WAS AIMED AT FLM, AND FLM WAS THE TARGET OF FORD'S ATTEMPT TO PREVENT INDEPENDENT WHOLESALERS FROM DEALING IN CRASH PARTS, THAT FLM HAD STANDING TO SUE

One of Ford's major contentions in its appeal to this Court is that FLM does not have standing to sue because, according to Ford, any injury suffered by FLM due to Ford's actions was "indirect, derivative and incidental", and that FLM was not the target of Ford's discriminatory pricing scheme even if such a system did exist (Ford's Brief, p. 29). In addition, Ford claims that FLM has no standing to sue under Section 2(a) of the Robinson-Patman Act because FLM has never purchased crash parts directly from Ford but only from franchised Ford dealers.

The record clearly shows, and the District Court properly found, that FLM was the intended target of Ford's discriminatory pricing scheme, that the damages suffered by FLM were not "derivative, indirect and incidental" but were clearly intended by Ford to affect FLM and that the Robinson-Patman Act does not require that a plaintiff be a direct purchaser from a defendant in order to have standing to sue.

The District Court in its decision made specific findings of fact which are clearly supported by the record that at the time Ford changed its wholesale incentive policy to withhold the wholesale incentive allowance from franchised Ford dealers on sales made to independent wholesalers and not directly to repair shops that

"there was no other company besides FLM who had successfully established a business as acting as middleman between Ford dealers and independent repair shops in the sale of crash parts" (1598) and that Ford created the wholesale incentive policy for the specific purpose of inhibiting sales to middlemen such as FLM and to discourage such middlemen from competing in the distribution of crash parts (1618). The District Court also went on to find, in no uncertain terms, that:

> "Also I cannot believe that the Ford personnel responsible for the change of policy respecting the wholesale incentive allowance did not have FLM specifically in mind as a shining example of the type of successful middleman Ford was attempting to discourage." (1603)

Rule 52(a) of the Federal Rules of Civil Procedure provides that in all actions tried to the Court without a jury the district court's "findings of fact shall not be set aside unless clearly erroneous".

Ford, in its appeal to this Court, has ignored the District Court's findings of fact that Ford's discriminatory pricing scheme was clearly aimed at FLM and has not made any claim that the District Court's findings of fact were clearly erroneous and should be set aside by this Court. Instead, Ford has cavalierly ignored the District Court's findings and is asking this Court to make a new and different finding unsupported by any evidence in the record and clearly contrary to the findings made by the District Court which were fully supported by the record that Ford's discriminatory pricing policy was not directed at FLM, that any injury to FLM suffered

because of its discriminatory pricing policy was only "derivative, indirect and incidental" and, therefore, deny FLM standing to sue.

FLM submits that in light of the District Court's finding that FLM was the target of Ford's discriminatory pricing scheme, this Court cannot base its decision upon any other findings than those made by the District Court unless the District Court's findings are found to be clearly erroneous. This Court is bound by the District Court's findings of fact that FLM was the target of Ford's discriminatory pricing scheme and, on that basis alone, must find that FLM has standing to sue as it has suffered injuries by reason of Ford's violation of the antitrust laws.

Assuming that the District Court's findings did not make it clear that FLM was the target of Ford's discriminatory pricing scheme and, accordingly, had standing to sue, under the facts in our case, FLM would still have standing to sue pursuant to 15 U.S.C. 15.

Section 2(a) of the Robinson-Patman Act was added in 1936 as an amendment of the Clayton Act and as such became part of the antitrust laws of the United States. Section 4 of the Clayton act, 15 U.S.C. 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996 (1948), the Supreme Court said:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (at 236)

See Also "Standing to Sue for Treble Damages Under §4 of the Clayton Act" 64 Col. L.Rev. 570 (1964).

Ford, in this action, is attempting to read a requirement of privity into the antitrust laws although the courts have long since made it clear that the Clayton Act is not confined to persons in privity with the wrongdoer, Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358, 363 (9th Cir., 1955).

The cases cited and relied upon by Ford for the alleged proposition that privity is required are not to the contrary. In this Court's most recent statement on standing to sue cited by the defendant, Long Island Lighting Co. v. Standard Oil Co. of California, 521 F.2d 1269 (2d Cir. 1975), this Court denied standing to an end user of petroleum products whose supplier's supplier had entered into a group boycott aimed at Libya and Saudi Arabia, two oil producing countries. This Court in Long Island Lighting Co. made certain to point out that the plaintiffs in that case were "customers of a non-target" and thus had no standing to sue (521 F.2d at 1274). This is totally inapposite to our case where FLM was the intended target of Ford's discriminatory pricing scheme and, in fact, was the only person injured by Ford's violation of the antitrust laws. FLM would purchase crash parts from franchised Ford dealers at a small premium

above dealer's cost with the dealer giving FLM the benefit of all allowances and discounts which the dealer received. When the 25 percent wholesale incentive allowance was withheld by Ford from its franchised dealers on sales to FLM, the franchised Ford dealer was not injured since it simply continued to receive the same premium from FLM on sales of crash parts but simply could no longer pass on the wholesale incentive allowance which was withheld from the dealer by Ford on sales to FLM.

In our case, not only was FLM the sole party injured by Ford's discriminatory pricing practice but is probably the only party in existence who could possibly bring an action against Ford. In Hanover Shoe Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224 (1968), the Supreme Court stated:

> "We recognize that there might be situations--for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged--where the considerations requiring that the passing-on defense not be permitted in this case would not be present."
> (392 U.S. 494)

In our case we have precisely that situation where FLM purchased crash parts from Ford dealers on a cost-plus basis and accordingly the dealer passed on the entire price discrimination to FLM and FLM was the only party injured and the only party in existence who could possibly bring an action against Ford.

The facts in our case, where FLM was the target of Ford's discriminatory pricing scheme and the only person injured by that scheme,

are totally different from those in Long Island Lighting Co., supra, where the plaintiffs were "customers of a non-target". The series of cases cited by the Court in Long Island Lighting Co. and by Ford on page 31 of its brief: Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971; Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972), are all cases where the plaintiff was one step removed from the target of the anti-trust violation, and there was at least one other party between the plaintiff and the defendant who had been directly injured with standing to bring an antitrust suit. Accordingly, the court in those cases denied standing in order to avoid multiple actions and possible recoveries. A situation of that nature does not exist in our case.

The District Court, in its decision, specifically made mention of both Billy Baxter, Inc. and Calderone Enterprises Corp., supra, (1617), carefully analyzed the target area test set out in those cases and stated:

> "Applying the 'target area' test to the present case, it would seem to be clear that FLM is within the target area of the alleged wrongful price discrimination practiced by Ford. The purpose of Ford's change of policy regarding the wholesale incentive allowance was to withdraw this price benefit from Ford dealers who sold to middlemen such as FLM. It was the obvious desire of Ford to cut the middleman out of the channel of distribution, and have the Ford dealers sell directly to the independent body shops." (1617-1618)

The Supreme Court in Perkins and Fred Meyer, Inc., supra, has

clearly set out the applicable rules with regard to standing to commence an action under the Robinson-Patman Act. In Fred Meyer, Inc., an action brought pursuant to Section 2(d) of the Robinson-Patman Act dealing with promotional allowances, the Supreme Court held that a retailer who is not a direct customer of a supplier but who purchases a supplier's product from a wholesaler and competes with retailers who purchase directly from a supplier had standing to bring an action against a supplier if it was not granted the same promotional allowances which the supplier granted to direct purchasing retailers.

Subdivision (d) of the Robinson-Patman Act does not contain the all-encompassing language used in subdivision (2). Subdivision (d) of the Act refers only to customers while subdivision (a) refers to purchasers and to "customers of either of them". Nevertheless, the Supreme Court in Fred Meyer, Inc. has construed customer in subdivision (d) to mean all those persons, whether direct customers or not, whom the act was supposed to protect (390 U.S. at 352).

If any doubt remained after Fred Meyer, as to the standing of a party, who is not a direct purchaser from the price discriminator, to bring an action under subdivision (a) as well as under subdivision (d) of the Act, that doubt was laid to rest by the Court in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969). Perkins was a case brought pursuant to subdivision (a) of the Act.

The court in Perkins stated in no uncertain terms:

> "In FTC v. Fred Meyer, Inc., 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed. 2d 1222 (1968), we held that a retailer who buys through a wholesaler could be considered a 'customer' of the original supplier within the

> meaning of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act, a section dealing with discrimination in promotional allowances which is closely analogous to §2(a) involved in this case. In Meyer, the Court stated that to read 'customer' narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act. Similarly to read 'customer' more narrowly in this section than we did in the section involved in Meyer would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain."(emphasis added at 647)

This Court in American News Company v. F.T.C., 300 F.2d 104, 109 (2d Cir., 1962) stated:

> ". . .The term 'customer' in § 2(d) should be given the same meaning as 'purchaser' in § 2(a) and (e) in order to harmonize parallel sections of a statute aimed at a common purpose."

There is no longer any doubt that a person need not be a direct "purchaser" or "customer" in order to have standing to sue under the Robinson-Patman Act.

Ford, in its attempt to claim that FLM has no standing to maintain this action, has relied upon a line of cases stemming from dicta contained in Klein v. Lionel Corp., 237 F.2d 13, 14-15 (3d Cir. 1956), which stated that an individual had no standing to sue unless he was a direct purchaser from the person charged with the discrimination.

In Klein, the plaintiff was a retailer selling electric trains purchased from a wholesaler. The defendant also sold

its trains directly to chain stores for the same price which it charged to the plaintiff's wholesaler. The plaintiff sued claiming that he was injured in competing for the sale of electric trains since he naturally had to pay more to wholesalers to obtain those trains than was being paid by the direct-buying chain store. The District Court in Klein dismissed the plaintiff's complaint on the ground that there had been no price discrimination since Lionel charged all of its purchasers the same price. The District Court in Klein specifically reserved the question and left it open as to whether a retailer would have standing to sue for injuries which he suffered by reason of a price discrimination practiced against his wholesaler. See Klein v. Lionel Corp., 138 F.Supp. 560, 564 (D.Del. 1956).

The Third Circuit affirmed the dismissal of the complaint in Klein but went on to say in dicta that a plaintiff had no standing to sue unless he was an actual purchaser from the person charged with the discrimination (237 F.2d at 14).

Although Klein has been cited by numerous courts since that time for the proposition that a plaintiff had no standing to sue for a violation of the Robinson-Patman Act unless he was a direct purchaser from the person charging the discriminatory prices, the position taken by the Court in Klein has been criticized and explained even prior to Fred Meyer and Perkins, supra, making it clear that there was no privity requirement or direct purchaser requirement in order to have standing to sue under the Robinson-Patman Act.

In a 1965 article in the Utah Law Review entitled "Price

Discrimination - Functional Discounts: "Equal Opportunity to All?", 9 Utah L. Rev. 626 (1965), the author states:

> "In cases such as Klein, one should be careful to avoid the mistake of thinking of the dismissal as one based on lack of standing. That was not the case. the plaintiff clearly had sufficient interest to sue had he been able to establish a prima facie case of price discrimination. Section 4 of the Clayton Act, providing for private suits, directs that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court . . . at 645."

See also "Manufacturer's Responsibility for Price Under Section 2(a) of Robinson-Patman: Are Some Retailers More Equal Than Others?" 67 Yale L.J. 1246, 1254 n.29 (1958);and 70 Harv. L.Rev. 387, 390 (1956).

After Fred Meyer and Perkins, the question reserved by the District Court in Klein has been answered. A retailer who is injured because of price discrimination practiced against his wholesaler clearly has standing to sue.

In Fred Meyer, the Supreme Court held that a supplier had to give equal promotional considerations directly to a retailer who purchased through a wholesaler. Accordingly, if the retailer, who is not a direct purchaser, is not granted a promotional allowance, he certainly has standing to bring an action for any injuries he has suffered although he has not purchased directly from the supplier. Since the term "customer" in 2(d) and the term "purchaser" in 2(a) must be read consistently, see American News Company, supra, Section 2(a) likewise cannot require that a person be a direct purchaser in order to have standing to sue for a price discrimination which directly affects him.

Ford's position on this appeal confuses the "target area test" and equates it with a requirement of privity in order to have standing to sue under the Robinson-Patman Act,a requirement which simply does not exist.

If one reads Fred Meyer carefully it directly overrules the dicta set out by the Circuit Court in Klein, requiring a party to be a direct purchaser in order to have standing to sue. In Fred Meyer the Supreme Court considered the Circuit Court's decision and stated:

> ". . .Citing its prior ruling in Tri-Valley Packing Assn. v. FTC, 329 F.2d 694, 709-710 (C.A. 9th Cir. 1964), the court merely stated that a §2(d) violation could not be made out unless (1) Tri-Valley and Idaho Canning had in some way dealt directly with retailers competing with Meyer. . ."

In the case referred to, Tri-Valley Packing Assn. v. F.T.C., 329 F.2d 694, 709-710 (9th Cir. 1964), the Ninth Circuit relied upon Klein in setting forth the proposition that a plaintiff had to be a direct purchaser in order to have standing to sue. Fred Meyer directly reversed the Ninth Circuit's finding based upon Klein which required a party to be a direct purchaser in order to have standing to sue.

Similarly, the defendant's contention that every court which has considered the issue has held that only a direct purchaser has standing to sue (p. 35, Ford's brief) is inaccurate. There are at least two cases which have clearly held to the contrary. See Littlejohn v. Shell Oil Company, 483 F.2d 1140, 1143 (5th Cir. 1973)

and Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 377 (N.D. Ga. 1975).

The District Court in our case, in its decision, did not ignore the dicta set out in Klein but carefully analyzed the Klein case and found that:

> ". . .the dictum in Klein is contrary to the clear meaning of Section 2(a), and cannot be followed in view of the implications of the Supreme Court decision in Perkins v. Standard Oil Co. of California, 395 U.S. 642, 89 S. Ct. 1871, 23 L.Ed.2d. 599 (1969)." (1614)

Ford, in its brief, attempts to distinguish Perkins through a tortuous and convoluted construction of the Court's decision in Perkins (pp. 36-37, Ford's brief). Ford claims that Perkins did not do away with the requirement that a plaintiff be a direct purchaser to have standing to sue since Perkins was in fact a direct purchaser from Standard Oil. Ford carefully avoids referring to Fred Meyer while making this specious argument.

In addition, Ford claims that Perkins is distinguishable because in Perkins the wholesaler and the retailer to whom Signal, the favored purchaser, sold its gasoline were controlled by Signal as subsidiaries and that the Perkins case does not apply where there is an intervening independent distributor.

A careful reading of the Perkins case indicates that the fact that Perkins was a direct purchaser from the defendant

or that there was no independent distributor between the favored purchaser and the retailer is totally fortuitous and not the basis of the Court's decision in Perkins. This is perhaps most readily pointed out in the decision of Justice Marshall, concurring in part and dissenting in part, where Justice Marshall took the trouble to write a separate opinion in order to set forth his view that:

> ". . .I see no reason to intimate, even by indirection, what the result would be if wholly independent firms had intervened in the distribution chain. I would therefore explicity limit the holding to the facts of the case before us."
> 395 U.S. at 651, 89 S.Ct. at 1876.

The majority,obviously in the Court's opinion delivered by Justice Black, had taken the position that it made no difference if an independent firm had intervened in the chain of distribution or not.

In addition, the Court in Perkins made it clear that standing to sue for a violation of the Robinson-Patman Act was to be construed broadly and liberally and not in a restricted fashion. The Court held that Perkins as an individual had standing to sue for any loss which he had suffered because two of his corporations were unable to pay him agreed upon brokerage fees and rentals due to the defendant's actions causing injury to the corporation's business (395 U.S. at 649, 89 S.Ct. at 1875).

Ford's attempt to have this Court believe that FLM's standing to sue in this case would "open the flood gates" to

any plaintiff no matter how remote its interest or incidental its relationship to the party discriminating in price has no merit to it. Whatever may be the situation under different factual circumstances, under the circumstances in our case and the findings of fact made by the district court that FLM was the target of Ford's discriminatory pricing scheme -- findings of fact which cannot be set aside unless they are clearly erroneous, an argument which Ford has not even raised on this appeal -- FLM as the target of Ford's discriminatory pricing scheme clearly has standing to sue. The district court in its decision carefully analyzed the question of FLM's standing (1605-1622), and its findings should be upheld by this Court.

POINT III

THE DISTRICT COURT PROPERLY AWARDED FLM THF AMOUNT OF THE WHOLESALE INCENTIVE ALLOWANCE WITHHELD AS PART OF ITS DAMAGES AND THE DISTRICT COURT'S AWARD TO FLM FOR LOST PROFITS WAS ON A CONSERVATIVE BASIS AND ANY ERROR ACCRUED TO FORD'S BENEFIT.

On March 17, 1976 the district court rendered a supplemental opinion with respect to damages (2022-2043). The Court denied all of FLM's claims for damages except for two items. The Court awarded FLM the amount of wholesale incentives withheld from November 1, 1972 through February 6, 1976 amounting to $246,766, a figure which is not disputed.

The district court also awarded FLM $44,736 for the profits which FLM had been deprived of based upon sales lost by FLM because of Ford's discriminatory prices.

Ford is appealing from the district court's award of these damages to FLM. Ford has not provided an alternative measure of damages which FLM is entitled to and is apparently of the opinion that even if Ford did violate the antitrust laws and FLM's business was injured and nearly destroyed, FLM is not entitled to recover any damages from Ford.

In support of its position, Ford's counsel on this appeal has obviously not analyzed the facts giving rise to FLM's damages and is attempting to avoid a clear stipulation entered into by Ford's trial counsel that if Ford was found to

have violated the antitrust laws, then, at the very least, FLM would be entitled to recover the amount of the wholesale incentives withheld. Instead, Ford on this appeal has resorted to catch words such as "automatic damages" analogizing this case to cases decided under totally different fact patterns and circumstances and which simply confuse the issues presently before the Court.

There is undisputed evidence that FLM would have received $246,766 as a wholesale incentive allowance if that allowance had not been withheld by Ford from its franchised dealers on sales to FLM. The amount is uncontraverted since it was a matter of simple arithmetic to calculate the incentive which FLM would have received on each part which it actually purchased during the relevant period from November 1, 1972 through February 6, 1976. All of the invoices supporting these purchases were provided to Ford's counsel and the amount is undisputed since the amount of the wholesale incentive allowance was found to have been wrongfully withheld by Ford from its dealers on sales to FLM and the entire incentive allowance was always passed on to FLM by the franchised Ford dealers from which FLM obtained the crash parts (415).

In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 431 (1968), the Court stated:

> "We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of §4.
>
> If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher." 392 U.S. at 489.

Similarly, in Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015 (1947), the Court stated that when a purchaser had proved that the prices which he had been charged were:

> "* * * discriminatory * * * it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination." 330 U.S. at 757.

Ford's attempt to analogize the facts in our case to those in Enterprise, Indus., Inc. v. Texas Co., 240 F.2d 457 (2d. Cir.), cert. den., 353 U.S. 965 (1957), and its resorting to such catch phrases as "automatic damages" do not in any way impugn the propriety of the district court's awarding FLM the full amount of the wholesale incentive allowances which were wrongfully withheld by Ford.

Enterprise, the case relied upon by Ford (p. 39, et seq., Ford's brief), was an action by a gasoline station against Texaco because Texaco had granted neighboring stations a favorable price during a gasoline war. This Court in Enterprise held that the plaintiff had not proved its damages or that it had any loss because of the alleged price discrimination. There had been no proof at all that the plaintiff had lost any sales because of the more favorable price granted to the neighboring stations. The fact situation in Enterprise is totally different from our case where the loss to FLM because of the price discrimination did not result entirely from a loss of sales or profits, but FLM was injured immediately upon the purchase of those crash parts by being required to pay 25 percent more for those parts because of Ford's discriminatory pricing scheme. FLM is entitled to recover the full amount which was withheld from it by Ford in violation of the Robinson-Patman Act.

If Ford's argument with respect to so-called "automatic damages" is upheld, then Ford would benefit from its own wrong doing in violation of the antitrust laws. It would be permitted to retain any difference between the $246,766 which should have and would have been paid to FLM, but for Ford's violation of the antitrust laws and FLM would be deprived of receiving monies it was clearly entitled to, but for Ford's violation of the antitrust laws. The antitrust laws should not be construed in a manner so as to permit a party to benefit by its own wrong.

In addition, even if we assume that the district court should perhaps have considered a different measure of damages, no objection to the Court considering this measure of damages with respect to the withholding of the wholesale incentive was raised at the time of trial and, thus, is not available for review at this time. See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 238, 60 S.Ct. 811 (1940). Not only did Ford's counsel not object to the Court considering the amount of the wholesale incentive allowance withheld as a proper measure of damages during the trial of this action, but trial counsel for Ford stipulated that this was the proper amount of damages, stating in unequivocal terms:

> "Were liability to be found, defendants submit that the only damages which could be recovered by plaintiff would be the precise amount of any additional wholesale incentive allowance which would have been payable to a franchised dealer selling parts to FLM after November 1, 1972 had FLM been an 'eligible customer' during that period." (1545)

The district court relied upon this stipulation in making its damage award (2024). Ford's sudden reversal of its position taken by its present counsel on this appeal and the attempt to avoid a stipulation entered into by Ford's counsel at the trial of this action through the use of a cavalier statement in a footnote on page 43 of Ford's brief is improper. The amount of $246,766 awarded by the district court to FLM for its loss of the wholesale incentive allowance was the amount stipulated to by Ford at trial and was properly awarded to FLM.

The district court also awarded FLM $44,736 based upon the profits which it would have made on sales which it lost because of Ford's withholding of the wholesale incentive allowance and preventing FLM from competing in the sale of crash parts.

The district court properly found and Ford has stipulated that FLM's sales had grown steadily from the day it commenced business in 1965 until the effects of the withholding of the wholesale incentive allowance prevented FLM from competing for the sale of crash parts. In 1973 FLM's sales were $798,947. After the withdrawal of the wholesale incentive, for the first time in its history, FLM's sales not only did not grow, but decreased to $695,188 in 1974. The district court refused to award FLM the profits it would have realized on its lost sales based upon a growth basis, in other words, that FLM's sales in 1974 would have increased above the $798,947 and would have increased again in 1975. Instead, the district court restricted FLM to sales it lost based upon a difference between the amount of its sales in 1973 and the decreased volume of sales after the withdrawal of the wholesale incentive allowance prevented FLM from competing.

The district court found that FLM's net loss of sales was $169,456 and specifically found that FLM's accounting methods in calculating its lost profits based upon its lost sales were satisfactory and unchallenged by any convincing

testimony or argument (2029). Based upon the foregoing, the district court awarded FLM $44,736 for lost profits. FLM contended that the actual lost profits calculated upon a growth basis were $122,936 (152e). The district court, however, refused to award FLM what it considered the proper measure of damages for lost profits, but only awarded FLM approximately one-third of that amount.

Ford is contesting the district court's award of $44,736 to FLM contending that FLM failed to make a reasonable showing of the amount of sales it lost. Ford contends that the district court assumed that the decline in FLM's sales volume after 1973 was attributable to the withholding of the wholesale incentive allowance and that it is unsupported by the evidence.

Ford's position on this appeal again raises the issues which it did not raise at trial and while it was given the opportunity to cross-examine FLM's witnesses and introduce evidence to contradict FLM's position that its business had been injured by the withholding of the wholesale incentive allowance so that it was experiencing a shortage of working capital after 1973 and was unable to compete in the sale of crash parts (2028).

Ford's argument that the district court failed to consider the fact that certain franchised Ford dealers were selling crash parts at a discount after 1973 and thus would have interfered with FLM's profit margin (p. 47, Ford's brief)

is a specious one. The district court calculated FLM's lost profits based upon the actual profit margin enjoyed by FLM. Additional sales would not in any way interfered with FLM's profit margin, but would increase its profit by both giving FLM additional profit on the additional sales and probably increasing FLM's profit percentage since many overhead costs would remain fixed.

Ford has totally ignored the proposition that plaintiffs in antitrust cases have always been entitled to recover lost profits which have been brought about by a defendant's violations of the antitrust laws. See Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (2d. Cir. 1970); Atlas Building Products Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959); and Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970).

It was precisely the same kind of testimony as was submitted by FLM with respect to its prior business history and the normal increase each year absent Ford's unlawful interference which the Court in William H. Rankin v. Associated Bill Posters, 42 F.2d 152 (2d. Cir. 1930), cert. den., 282 U.S. 864 (1931), held was sufficient to estimate future lost earnings and lost profits, the Court stating:

> "This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony." 42 F.2d at 155.

See, also, Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc. 176 F.2d 594 (2d. Cir. 1949).

Ford's reliance upon Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d. Cir.), cert. den., 369 U.S. 865 (1962), is misplaced. In that case, the testimony of the plaintiff's economist was excluded because it was based upon assumptions which were false, unreasonable and contrary to common sense. This Court in Autowest, Inc. v. Peugeot, Inc., supra, distinguished the Herman Schwabe case, 434 F.2d at 566 and made it clear that evidence such as that presented by FLM in this case was sufficient to justify an award for lost profits.

The district court's award of $44,736 to FLM for lost profits was not only proper, but was highly favorable to Ford since FLM's loss of profits on a growth basis which FLM was entitled to recover totaled $122,936. If any error was made by the district court in awarding FLM lost profits, that error was one in Ford's favor. Accordingly, the district court's award of lost profits to FLM in the sum of $44,736 should not be set aside except to be increased.

CONCLUSION

The district court properly found that Ford by charging 25 percent more to Ford dealers for crash parts which they resold to FLM had violated Section 2(a) of the Robinson-Patman Act. The district court as the fact finder also properly found upon the evidence in the record that FLM was the target of Ford's discriminatory pricing scheme and, therefore, had standing to sue. The damages awarded by the district court to FLM consisting of the withheld wholesale incentive allowance and a small portion of FLM's lost profits are only a fraction of the damages actually suffered by FLM. The judgment of the district court as appealed from by Ford should be affirmed in all respects.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLM COLLISION PARTS, INC.,
Plaintiff- Appellee- Cross Appellant,

- against -

FORD MOTOR CO. AND FORD MARKETING CORP.,
Defendants- Appellants- Cross- Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 8th *day of* June *19*76 *at* 48 Wall Street, New York, New York *deponent served the annexed* Appellees Brief *upon*

Sullivan & Cronwell
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 8th *day of* June *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

victor ortega

VICTOR ORTEGA